U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

Issue date: 24Sep2001

CASE NO.: 2000-LHC-0917
OWCP NO.: 62-114683

In the Matter Of:

SERVIO A. FERNANDEZ
Claimant

v.

BALFOUR BEATTY, INC.
Employer

and

GENERAL ACCIDENT INSURANCE COMPANY OF PUERTO RICO
Carrier

APPEARANCES:

Thomas Alkon, Esq.
James A. Meaney, Esq.
For the Claimant

Edgar A. Christensen, Esq.
For the Employer/Carrier

BEFORE: **DAVID W. DI NARDI**
District Chief Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on February 23, 2001 in Christiansted, St. Croix, U.S. Virgin Islands, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administration Law Judge, CX for a Claimant's exhibit, JX for a Joint Exhibit

and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On May 24, 1994, Claimant suffered an injury in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on June 14, 1999.

7. The applicable average weekly wage is $479.56.

8. The Employer voluntarily and without an award has paid temporary total compensation for various periods of time, for a total of $93,396.13. Medical benefits thus far total $14,794.87.

The unresolved issues in this proceeding are:

1. Whether Claimant's current condition is causally related to his maritime injury.

2. If so, the nature and extent of his disability.

3. The date of his maximum medical improvement.

4. Entitlement to an award of medical benefits and interest on any unpaid compensation benefits.

5. Entitlement to an attorneys' fee and reimbursement of litigation expenses.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 2	Attorneys' fee petition and itemized litigation expenses	03/07/01

The record was closed on March 7, 2001, as no further documents were filed.

Summary of the Evidence

Servio A. Fernandez ("Claimant" herein), forty (40) years of age, who was born and raised in Santo Domingo, the Dominican Republic, and who has lived, at various times, in New York and Puerto Rico, and who has lived in the U.S. Virgin Island for eleven (11) years or so, left school in the third year of high school or secondary school, at age 23; he can read and write in Spanish but can understand some English but cannot write in this language. Claimant's employment is that primarily of manual labor and he began working in 1993 as a laborer for Balfour Beatty, Inc. ("Employer") on the construction of the pier at Fredericksted in the western part of St. Croix, a pier adjoining and extending into navigable waters. Claimant performed a myriad of duties primarily assisting the skilled workers who were doing the actual construction work, Claimant remarking that he had to carry jackhammers, crane cement, etc., from place to place as needed by the workers. (TR 43-44; JX 14 at 4-31)

On May 4, 1994 Claimant was working on navigable waters from a small barge and was in the process of "knocking down the old pier." He and a co-worker were working on a work platform when a sudden gust of seawave overturned the platform and Claimant was thrown in the water, severely injuring his low back and left leg. The pain worsened and, about four hours later, Claimant went to the hospital where he was examined by a doctor whose name he did not know. He returned to work the next day and apparently a dispute arose as to whether Claimant could perform his duties as a laborer; he asked to be allowed to work in an area where he "could be standing" but he was asked to sign a statement that he was refusing to work, and Claimant refused to sign the statement, "and that was it." He has not returned to work for the Employer since May 25, 1994. (JX 14 at 31-33)

Claimant has been either treated or examined by Dr. Walter J.M. Pedersen, Dr. Nathan Rifkinson, Dr. Charles A. Payne and Dr. Aaron Mercardo. He has not been able to work steadily in the intervening years because of his back and leg pain but he has been able to do some painting for "a company supposedly

after (that) with friends in order for (him)... to earn some money." He worked for that company last year for two weeks but, according to Claimant, "They left" the island. The painting involved a communication building and he was paid cash at the rate of $8.00 per hour. He did not have to climb any ladders during those two weeks and he does some of the household cooking in view of his past work in a restaurant. He also has "a lot of chickens" and he feeds them. He also helps out around and inside his home as long as he can physically do it. He has looked for work but no one will hire him because of his physical restrictions and his inability to speak or write in the English language. He has looked for work at the St. Croix airport, and at the Hess Oil Refinery, at various hotels and many other places. He has filled out a number of employment applications but these efforts have produced "negative results." (TR 44-51; JX 14 at 33-44)

Claimant's condition is slowly improving and he is now able to walk. In view of his age he would like to return to work and he wants to be retrained for easier work that he can do so that he can support his family. Claimant testified that he was truthful in his answers to Dr. Pedersen but when he went to see the last doctor, Dr. Rifkinson, Claimant admitted that he "use(d) evasive maneuvers because they used to treat us pretty harsh, me and my wife. And they used to tell us to keep quiet, I am the doctor." If any doctor recommends surgery for the Claimant, he "will go at once" because he has "a lot of pains that I have suffered a lot." He no longer has physical therapy because "it was cut from (me?) at once," although that therapy improved his condition. He still does some of the recommended exercises at home. (JX 14 at 44-62)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent**

v. Matson Terminal, Inc., 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that

the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer’s burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit held that an employer need not rule out any possible causal relationship between a claimant’s employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim “in the absence of substantial evidence to the contrary.” 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The “ruling out” standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O’Kelley v. Dep’t of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section

20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also**

Cairns v. Matson Terminals, Inc., 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert**

v. John T. Clark and Son of Maryland, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his lumbar and left leg problems, resulted from his May 24, 1994 accident while in the course of his maritime employment with the Employer. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusziewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if

an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find and conclude, that Claimant sustained injuries to his low back and left leg in the course of his maritime employment on May 24, 1994, that the Employer had timely notice of such injury, authorized certain medical care and treatment and paid Claimant certain compensation benefits and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant’s disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20

presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

In the case at bar Claimant's medical records reflect that his July 19, 1995 and May 24, 1994 x-rays were read by the radiologists as showing a herniated disc at the L5-S1 level on the right side and a bulging disc at the L3-L4 level and L4-L5 discs with widebased posterior protrusion. (JX B)

Claimant's medical problems were initially summarized in the November 29, 1994 report to the Office of Workers' Compensation Programs wherein Dr. Nathan Rifkinson states as follows (JX 3):

"On May 20, 1994 the patient was working with a jack-hammer when he slipped and fell on a large plank which was submerged in water while working at a pier. He developed immediate pain in the lower back and several hours later some pain in the left lower extremity. He went to the physician in the emergency room and had x-rays taken, but he does not know the results. Three days later the patient was sent back to work on a trial basis but he lasted a week and then stopped because of increased pain in the lower back and in the left lower extremity. The patient visited Dr. Pedersen who sent the patient for physiotherapy for three weeks. At present he continues having some low back discomfort. Walking and standing are quite comfortable although he is not completely free of discomfort. Sitting is his worse position since it is then that he feels most discomfort in the lumbar region and at times in the left lower extremity. However, the patient states he is feeling much better than after the early weeks of his injury. He thinks that his relative inactivity is responsible for his improvement. He states that he would like to try some light work...

"Impression: 1) Lumbar myositis, by history.

2) Periodic radiculitis of the left lower extremity, possibly due to a herniated disc, but we need corroboration with an MRI study of the lumbar area.

3) After the studies are done, I would like to see both the CT scan and the MRI films. The patient brought no x-rays or other films to the office.

"The patient may seek light work which does not require forward bending at the waist or heavy lifting.

"The history as described can be assumed to be the cause of the patient's symptoms at this time.

"After seeing the MRI and the CT films I would be in a better position to express more definite diagnoses."

Dr. Charles A. Payne, a neurologist, examined Claimant at the Carrier's request and the doctor sent the following letter to the Carrier on May 7, 1998 (JX 5):

"**CHIEF COMPLAINT:**

Low back pain

"**HISTORY OF THE PRESENT ILLNESS:**

This 37 year old male described having fallen while on the job injuring his low back on May 20, 1994. He was initially seen by Dr. Walter Pedersen, orthopedist, who ordered CT scan of the lumbar spine and referred him to Ms. Schuster for physical therapy.

The CT scan was reported on July 21, 1994 as "slight L3 protrusion, lumbar CT otherwise negative." The reports from Ms. Schuster's rehabilitation service dated August 15, September 30, and August 31, 1994 was supplied and are a matter of record. Also available were reports from Dr. Nathan Rifkinson, neurosurgeon, dated November 29, 1994 and Dr. Hiram Mercado, also neurosurgeon, dated November 14, 1995 and May 22, 1996. There were also reports from Douglas W. Menzies, chiropractor dated February 25, and May 15, 1995..."

Dr. Payne, after his review of Claimant's medical records and diagnostic tests and after the physical examination concluded as follows (**Id.**):

“**IMPRESSION**:

Painful low back syndrome with history of discogenic disease by imaging.

“**SUMMARY**:

Because of the lack of specific medical treatment over almost the past two years except for routine office visits, for rating purposes, it can be said that the Claimant has reached maximum medical benefit. In my professional judgment, he is not a candidate for surgery at the present time.

Using the criteria of the **Guides to the Evaluation of Permanent Impairment** of the American Medical Association, Edition four, the low back syndrome with discogenic disease is considered a 7% whole person impairment,” according to the doctor.

Dr. Rifkinson sent the following letter to Claimant’s attorney on September 11, 1999 (JX 3):

“Mr. Servio Fernandez was first seen in our office on November 29, 1994 as described in my report of that date, which you state that you have in your possession, I have not seen him since that date until to-day.

“My impression at the time (11/29/94) was that Mr. Fernandez had a lumbar myositis and a possible herniated lumbar disc, which was reported by CT as a mild protrusion of the disc at the L3-L4 interspace. However, I suggested that we needed corroboration with a lumbar MRI study. Also that the patient should not do any work that required bending at the waist or heavy lifting.

“Today, Mr. Fernandez states that he has not worked since his injury sustained on May 20, 1994. He states that he has not had any pain in the left lower extremity since two years ago after physiotherapy sessions, but he has low back discomfort when he drives or sits too long. He has no pain when walking on level ground. At times the plantar surface of his left foot feels numb. Periodically, he has some cervical discomfort, but he has no radiation of pain to the upper extremities.

“**NEUROLOGICAL EXAMINATION**:

The patient is well developed and slender.

The gait is normal.

Forward bending is 90 degrees.

He walks well on heels and toes.

The knee and ankle jerks are normal.

The dorsiflexor strength is adequate bilaterally.

Right-straight-leg raising is 85 degrees.

Left-straight-leg raising is 80 degrees with slight discomfort in the inferior portion of his left buttock.

The neck is supple.

There is mild tenderness of the cervical muscles.

There is no Hoffman sign.

The Lehrmitte's sign is negative.

The biceps and triceps reflexes are within normal limits.

MRI done on May 23, 1997 reports a herniated disc at the L5-S1 interspace and bulging discs at the L3-L4 and L5-S1 interspaces.

"**IMPRESSION**:

1 - Myositis, mild, periodic.

2 - No radiculitis at present except for occasional numbness of the plantar surface of his left foot.

3 - Herniated disc at the L5-S1 level as reported in MRI.

4 - Herniated disc, lumbar in remission, at present.

"There is no indication for surgery at this time, but Mr. Fernandez should avoid occupations requiring forward bending or heavy lifting," according to the doctor.

The Carrier has referred Claimant for a vocational assessment by its expert, Enrique Rossy, and Mr. Rossy sent the following letter on April 27, 1998 to the Carrier (JX 6):

VOCATIONAL ASSESSMENT REPORT

ASSIGNMENT:

This case was referred to Rosa Brown and Associates, Inc., d.b.a. Disability Management Services on April 3, 1998 for a Vocational Assessment Report and to update the medical records.

Enrique Rossy, our Disability Counselor, was assigned to the case.

IDENTIFYING DATA:

This Counselor conducted the Initial Interview with the Claimant on April 24, 1998. Prior to this interview, this counselor contacted the client's attorney, Thomas H. Hart, to get his authorization. Mr. Fernandez is a 37 year old Dominican male who lives in a rural neighborhood in Fredericksted, St. Croix. The client has been living for 9 years in the United States, Puerto Rico and St. Croix. He is not married but lives with Ms. Ana C. Morales. The client is 5 ft 8 inches tall and his actual weight is 138 lbs.

This interview took place in Fredericksted's Pier since Mr. Fernandez demonstrated some resistance to a home visit. The client was accompanied by Ms. Morales. Most of the questions asked by this counselor were answered by both Mr. Fernandez and Ms. Morales in a very polite and cooperative way. The client stated that his health condition is good even though he still has back and neck pains. The client has not worked since the day of the accident.

"MEDICAL INFORMATION:

Mr. Fernandez stated that "on" (?) May 20, 1994, while working at Frederistead's Pier, a sea wave hit him making him fall into a large plank submerged in the water. After the fall he strained his back significantly as the rough sea hit him back and forth. Several physicians have treated Mr. Fernandez, due to his low back condition. The physicians include Dr. Walter J.M. Pedersen (Orthopedist), Dr. Douglas W. Menzie (Chiropractor), and Dr, Hiram Mercado (Neurosurgeon). Mr. Fernandez also received physical therapy by Angela Schuster.

On August 1994, Mr. Fernandez began physical therapy with Angela Schuster. On a report made by Ms. Schuster on August 15th, she stated that the patient's potential to achieve the established rehabilitation goal was good. However, on August 31st she reported that the patient's primary symptoms had changed from pain to increasing pain in the lower back, which by September 30th turned into severe pain, according to Ms. Schuster's report.

On November 14, 1995, the client was evaluated by the Neurosurgeon, Dr. Hiram Mercado, who stated that "there is no evidence of radicular entrapment, no neurological deficit into (sic) account for neurosurgical procedures. He should receive rehabilitation program looking for a light work which do (sic) not require forward bending or heavy lifting."

On February 24, 1995 the Chiropractor, Douglas Menzies, stated that there had been significant improvement with treatment and that the patient feels that he was on his way to recovery. He also estimated that the MMI would be reached within five to seven months.

Our Medical Questionnaire was sent to be completed to the Orthopedist Dr. Walter J.M. Pedersen. The completed questionnaire, completed on April 22, 1998, stated that the client (sic) present diagnosis of L5-S Right Herniated Disc. L4-5; L3-4 Bulging Disc. Dr. Pedersen stated that due to the presence of a slipped disc in his lower back, a surgical intervention was needed. He did not calculate a disability rating.

Regarding lifting, he said that the patient can lift from 0 to 10 pounds occasionally, and the maximum time he can be standing is from 0-2 hours, walking from 0-2 hour, sitting from 0-2, explaining that the client has restrictions for bending, climbing, squatting, running and jumping. Regarding a projected return to work dated, Dr. Pedersen stated that it is undetermined because the patient requires surgery. (Enclosed Dr. Walter Pedersen completed questionnaire). Dr. Pedersen also filled out A Physical Capacities Evaluation form where he comments that the patient has untreated lumbar disc herniation which limits his ability to do any type of work. According to Dr. Pedersen, Mr. Fernandez has not reached M.M.I. and is not released to return to work. An interview with Dr. Pedersen was not possible because the day this counselor was in St. Croix, Dr. Pedersen was behind his schedule and did not have time to see this consultant.

We also submitted a medical questionnaire to the Chiropractor, Douglas Menzies. By the time this report was done we had not received the completed questionnaire.

When interviewed, Mr. Fernandez stated that he is only taking Tylenol for his pain because he ‘doesn’t believe in medications.’ He also stated that the first medications prescribed by Dr. Pedersen affected his sleeping patterns and made him paranoid.

“**VOCATIONAL ASSESSMENT:**

Mr. Fernandez went up to second grade of elementary school. He reported that while living in the Dominican Republic, he attended some agronomy classes at a private institute, however, he refers (sic) that he never got any degree or license.

Using the description of duties presented by the client on his last job, this consultant did a research using the Dictionary of

Occupational Titles (D.O.T.) of the US. Department of Labor in order to identify the job with its characteristics and skills. His last job corresponds to Construction Worker I (D.O.T. #869.687-026). This is a semi-skilled job which is considered heavy work with lifting 100 lbs. maximum. This occupation could require performing any combination of duties on construction projects, usually working in utility capacity, by transferring from one task to another where demands require workers with varied experience and ability to work without close supervision. This job requires leveling earth to fine grade specifications using pick and shovel. Mixing concrete, smoothing and finishing freshly poured cement or concrete, using float, trowel or ???. Erecting scaffoldings, shoring and braces. Performing a variety of tasks involving dexterous use of hands and tools such as demolishing buildings, sawing lumber, dismantling forms and removing projections from concrete.

Before his last job, Mr. Fernandez was working on his own as a construction worker performing a variety of tasks such as brick laying, painting, mixing concrete, marble or wood. This job is considered also as a Construction Worker I by the D.O.T.

Mr. Fernandez referred (sic) that in 1985 when he came to Puerto Rico, he worked with a photographer helping him with the cleaning of the studio and moving photographic equipment.

When Mr. Fernandez was living in the Dominican Republic, he was working as a Farmer on his own having both crops and livestock. According to the D.O.T. this job (421.161-010) is considered a skilled job with a heavy demand level.

“**CONCLUSIONS**:

When Mr. Fernandez was interviewed he clearly stated that he suffered from back and neck pain and that he could not work the way he use (sic) to. He emphasized that he always worked and that he would like to start working again if it was not because of his condition. However, Mr. Fernandez also referred (sic) that he spends his time breeding chickens and sowing plants. He also stated that he can drive short distances and that he can be standing for a while. This suggests that although Mr. Fernandez is disabled to work as a construction worker, he could work doing light or sedentary jobs where he can alternate sitting, standing and walking. During the interview this consultant observed Mr. Fernandez driving and walking without any problem. To obtain the M.M.I. it is necessary that Mr. Fernandez will be operated as recommended by Dr. Pedersen.

"RECOMMENDATIONS:

1. Discuss with the adjuster the possibility of coordinating an MMI with the purpose of improving the work restrictions."

Mr. Rossi sent the following Labor Market Survey to the Respondents' attorney prior to the hearing (JX 10):

"ACTIVITIES

1/16/01

- Telephoned Mr. Christensen to obtain referral information.

1/23/01

- Reviewed video sent by Attorney Christensen.

1/24/01

- Telephoned Mr. Christensen.

1/30/01

- Received and reviewed Dr. Pedersen's deposition and Mr. Fernandez's medical records.

2/5/01

- Telephoned Mr. Christensen to discuss the case.

2/12/01

- Performed Internet research to obtain information about St. Croix potential employers and telephone numbers that would be helpful to conduct the LMS.

- Telephoned St. Croix Employment Office. Spoke to Mr. Ali Abdul who agreed to fax us a list of current jobs available on St. Croix.

- Telephoned **The St. Croix Avis** and **The VI Daily News** to find out if these newspapers could be bought in PR to check the classified ads.

- Telephoned two private employment agencies in St. Croix to verify jobs available. Both agencies referred (sic) that they could not fax us a list of jobs available in St. Croix.

2/13/01

- Read Mr. Fernandez' and Mrs. Morales' deposition taken on 1/29/01.
- Telephoned Attorney Christiensen for further discussion of the case.
- Telephoned the V.I. Department of Labor to obtain information about unemployment in St. Croix.

2/14/01

- Telephoned several potential employers to check if there are job openings and verify salary information.
- Report preparation.

"Labor Market Survey Results

We have identified a few jobs that we understand that Mr. Servio Fernandez is capable of doing taking into consideration his education, work experience, and physical capabilities. In identifying appropriate jobs we have used as a reference of Mr. Fernandez capabilities and restrictions Dr. Nathan Rifkinson's letter to Mr. Alkin, dated September 11, 1999 in which he stated that Mr. Fernandez "should avoid occupations requiring forward bending and heavy lifting." Heavy work involves occasionally lifting more than 100 pounds. We also used Dr. Pedersen's deposition (6/28/00) in which he mentioned that based on a report that he prepared for the Department of Labor on 11/21/97, Mr. Fernandez can not lift over 25 to 30 pounds.

Assuming that Dr. Pedersen's restriction of no lifting over 25 to 30 pounds is correct, we have identified several light jobs that are currently available in St. Croix. Light work involves occasional lifting a maximum of 20 pounds at a time with frequent lifting and/or carrying of objects weighting up to 10 pounds.

1. Waiter (D.O.T. # 311.377-010)

2. Fast Food Worker (D.O.T. # 311.472-010)

3. Room Attendant (D.O.T. # 323.687-014)

1. Job Title: Fast Food Worker
   Salary: $5.15 P/H
   Employer: KFC, Fredericksted

2. Job Title: Waiter 0718-2-99(071-8299)
   Salary: $4.65 P/H
   Employer: Available through the Department of Labor

3. Job Title: Fast Food Worker 0417-2-00(041-7200)
   Salary: $3.35 P/H, plus tips
   Employer: Available through the Department of Labor

4. Job Title: Fast Food Worker
   Salary: $5.15 P/H
   Employer: McDonald's, Golden Rock, Christiansted

5. Job Title: Fast Food Worker
   Salary: $5.15 P/H
   Employer: Pizza Hut, Villa La Reine Shopping Center

6. Job Title: Waiter 0074-2-00(007-4200)
   Salary: $2.75 P/H plus tips
   Employer: Available through the Department of Labor

7. Job Title: Room Attendant 0452-2-00(045-2200)
   Salary: $6.00 P/H
   Employer: Available through the Department of Labor

8. Job Title: Room Attendant 0488-2-00(048-8200)
   Salary: $6.00 P/H
   Employer: Available through the Department of Labor

9. Job Title: Fast Food Worker
   Salary: $5.15 P/H
   Employer: McDonald's, Sunshine Mall, Fredericksted

Assuming that Mr. Fernandez should avoid heavy lifting as stated by Dr. Rifkinson on the letter sent to Mr. Alkon on 9/11/99, we have identified several jobs that are considered of a medium level of physical strength and which are currently available in St. Croix. Medium level work requires occasionally lifting a maximum of fifty pounds at a time with frequent lifting and/or carrying of up to 25 pounds.

1. Janitor (D.O.T. # 282.664-010)

2. Cook (D.O.T. # 313.374-010)

3. Bus Person (D.O.T. # 311.677-018)

4. Machine Operator (D.O.T. # 619.685-062)

5. Cleaner II (D.O.T. # 919.687-014)

10. Job Title: Cook 0056-2-00(005-6200)

Salary: $6.00 P/H
Employer: Available through the Department of Labor

11. Job Title: Cook 0215-2-00(021-5200)
Salary: $6.00 P/H
Employer: Available through the Department of Labor

12. Job Title: Bus Person 0488-2-00(048-8200)
Salary: $6.00 P/H
Employer: Available through the Department of Labor

13. Job Title: Machine Operator 0593-2-00(059-3200)
Salary: $6.00 - $5.60 P/H
Employer: Available through the Department of Labor

14. Job Title: Janitor 029-2-00(029-8200)
Salary: $6.00 - $7.50 P/H
Employer: Available through the Department of Labor

15. Job Title: Car Cleaner 0503-2-00(062-0200)
Salary: $5.15 P/H
Employer: Available through the Department of Labor

Dr. Payne reiterated his opinions at his February 16, 2001 deposition, the transcript of which is in evidence as JX C, and the doctor's **Curriculum Vitae** is a part of that exhibit. I note that the doctor is Board-Certified in psychiatry and Neurology, as well as in Clinical Neurophysiology and the National Board of Medical Examiners.

Mr. Rossy reiterated his opinions at his February 16, 2001 deposition, the transcript of which is in evidence as JX 13. However, Mr. Rossy's **Curriculum Vitae** is not part of the transcript and I note that his signature page does not contain the usual initials signifying the professional and academic qualifications of the vocational counselor. I also note that Mr. Rossy's opinions, in response to intense cross-examination by Claimant's counsel at pages 15-32 of JX 13, wavered on Claimant's transferrable skills and residual work capacity.

Ms. Ana Celia Morales, Claimant's housemate, corroborated Claimant's testimony as to his daily chronic back, neck and leg pain and she credibly testified at her January 29, 2001 deposition, the transcript of which is in evidence as JX 15.

Dr. Walter J.M. Pedersen, Jr., Claimant's treating orthopedic surgeon, was deposed on June 28, 2000 and the transcript of his testimony is in evidence as JX 12. Dr. Pedersen, who first saw Claimant in June of 1994, testified that he took the usual social and employment history from Claimant, including the injury on May 20, 1994 at the Fredericksted Pier,

that he reviewed Claimant's diagnostic tests and medical records in preparation for his deposition and that Claimant's several level herniated discs are causally related to his work accident.

Dr. Pedersen forthrightly testified that Claimant's disc problems were treated conservatively with rest, medication and a back brace for support, that he saw Claimant as needed for followup, that Claimant had physical therapy for a certain period of time, that Claimant could not return to work at his former strenuous work as a laborer, that he could do light to moderate work as long as he lifted nothing over 25 to 30 pounds, infrequently lifted 10 to 15 pounds and avoided bending and that Claimant reached maximum medical improvement on December 30, 1997. The doctor last saw Claimant on March 28, 2000. (JX 12 at 4-23)

Dr. Pedersen further opined that Claimant was disabled from work as a construction laborer, that Claimant should get out of the house, do some walking or exercises to limber his lumbar area, that he should be retrained for other fields of endeavor in view of his "limited educational background" and as "he's done nothing but manual labor, so his (transferrable) skills are very limited." According to the doctor, "Retraining with the level of education that he has is something that's less strenuous would be certainly to his benefit." (JX 12 at 23-30)

This Administrative Law Judge, having reviewed the totality of this closed record, finds and concludes that Claimant has established that he cannot return to work as a construction laborer. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit probative and persuasive evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability, as shall be discussed further below.

As summarized above, all of the doctors are in agreement that Claimant cannot return to work at his former job and the Employer's vocational consultant, Enrique Rossy, essentially stated that Claimant was totally disabled as of April 27, 1998 (JX 6) and on the eve of trial submitted a Labor Market Survey purporting to show fifteen (15) jobs as suitable for Claimant. (JX 10)

However, I agree with Dr. Pedersen that Claimant with his limited transferrable skills, limited educational ability and an absolute lack of knowledge of English, simply must be retrained for other fields. He certainly cannot work in any service industry job where he will be dealing with tourists and visitors to the beautiful island of St. Croix. Thus, that eliminates most of the service jobs identified by Mr. Rossy and the remaining jobs are rejected because of the lack of any specific information about the duties of those jobs as a machine operator, janitor or car cleaner or room attendant.

While the videotape (JX 8) shows Claimant engaged in certain physical activities, it is well-settled that a Claimant need not be totally bedridden to collect benefits under the Act and that the burden is on the Employer, when confronted with a claim for total disability benefits, to establish the availability of suitable alternate employment within Dr. Pedersen's restrictions, and herein the Employer has not sustained its burden, and I so find and conclude.

I further find and conclude that Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held

that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem**., 617 F.2d 292 (5th Cir. 1982).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on December 30, 1997 and that he has been permanently and totally disabled from December 31, 1997, according to the well-reasoned opinion of Dr. Pedersen. (JX 12)

With reference to Claimant's residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v.**

General Dynamics Corp., 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law in the First Circuit that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

Claimant maintains that his post-injury wages are representative of his wage-earning capacity, that he has learned how to live with and cope with his weakened back condition and that his Employer has allowed him to compensate for his back limitations. I agree as it is rather apparent to this Administrative Law Judge that Claimant is a highly-motivated individual who receives satisfaction in being gainfully employed. While there is no obligation on the part of the

Employer to rehire Claimant and provide suitable alternative employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

As already discussed above, the Respondents have offered a Labor Market Survey (JX 6 and JX 10) in an attempt to show the availability of work for Claimant as a fast food worker and a waiter and a room attendant and as a cook, a bus person, a machine operator, a janitor or a car cleaner. I cannot accept the results of that very superficial survey which apparently consisted of the counselor contacting the St. Croix Department of Labor and reviewing newspaper classified advertisements. There is no indication as to whether or not Mr. Rossy contacted any prospective employer by telephone and/or whether any job site may have been personally visited to observe the working conditions to ascertain whether that work is within the doctor’s restrictions and whether Claimant can physically do that work.

It is well-settled that Respondents must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v.**

Farmers Export Co., 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

The Labor Market Survey and the addendum (JX 6 and JX 10) cannot be relied upon by this Administrative Law Judge for the more basic reason that there is a complete absence of any information about the specific nature of the duties of a bus person, for instance, or for a machine operator, etc., and whether such work is within the doctor's physical restrictions. (JX 6 and JX 10) Thus, this Administrative Law Judge has absolutely no idea as to what are the specific duties of those jobs at the firms identified by Mr. Rossy.

In view of the foregoing, I cannot accept the results of the Labor Market Survey because, without the required information about each job, I simply am unable to determine whether or not any of those jobs constitutes, as a matter of fact or law, suitable alternate employment or realistic job opportunities. In this regard, **see Armand v. American Marine Corporation**, 21 BRBS 305, 311, 312 (1988); **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). **Armand** and **Horton** are significant pronouncements by the Board on this important issue.

Accordingly, I reiterate that Claimant is now totally disabled.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced

by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such

treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on the same day and requested appropriate medical care and treatment. However, while the Employer did accept the claim and did authorize certain medical care, other medical care, such as physical therapy has been denied Claimant. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, the Respondents shall authorize and pay for the reasonable, necessary and appropriate medical care in the followup treatment of Claimant’s injury before me, subject to the provisions of Section 7 of the Act.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents have accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits from the day of the accident to a certain point and timely controverted his entitlement to additional benefits. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer and Carrier ("Respondents"). Claimant's attorney filed a fee application on March 7, 2001 CX 2), concerning services rendered and costs incurred in representing Claimant between June 20, 1999 and February 23, 2001. Attorneys Thomas Alkon and James A. Meaney seek a fee of $15,089.60 (including expenses) based 73 hours of attorney time at $190.00 per hour.

In accordance with established practice, I will consider only those services rendered and costs incurred after June 14, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for his consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorneys, the amount of compensation obtained for Claimant and the Respondents' lack of comments on the requested fee, I find a legal fee of $15,089.60 (including expenses of $1,219.60) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer and Carrier ("Respondents") shall pay to the Claimant compensation for his temporary total disability from May 24, 1994 through December 30, 1999, based upon an average weekly wage of $479.56, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on December 31, 1999, and continuing until further **ORDER** of this Court, the Respondents shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $479.56, such compensation to be computed in accordance with Section 8(a) of the Act.

3. The Respondents shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his May 24, 1994 injury.

4. Interest shall be paid by the Respondents and Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including those medical benefits specifically discussed and awarded herein, subject to the provisions of Section 7 of the Act.

6. The Employer shall pay to Claimant's attorneys, Thomas Alkon and James A. Meaney, the sum of $15,089.60 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between June 20, 1999 and February 28, 2001.

A
DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl